

LEGAL ETHICS OPINION 1725

CONFLICT; APPEARANCE OF
IMPROPRIETY; REPRESENTING DEPT.
OF SOCIAL SERVICES AND ACTING
AS GUARDIAN AD LITEM FOR OTHER
CLIENT WITH MATTER ADVERSE TO
DEPT. OF SOCIAL SERVICES

You have presented a hypothetical situation in which Lawyer A and Lawyer B practice in a small county. The Department for Social Services (DSS) hires different attorneys within the county to handle its caseload. Lawyers A and B represent DSS from time to time. On any given day, Lawyer A may represent the DSS in one case in the juvenile and Domestic Relations District Court, while Lawyer B is the Guardian ad litem representing the child in the same case, or Lawyer A may be the Guardian ad litem (GAL) while Lawyer B represents the DSS. Under the facts you have presented, you have asked the committee to opine as whether the situation described presents a conflict of interest or any appearance of impropriety. You also question whether this situation may affect the attorneys' professional judgment.

The disciplinary rules applicable to your inquiry are DR:5-101(A), requiring a lawyer to decline employment if the lawyer's professional judgment may be adversely affected by his own financial, business, property or other personal interests, unless the client consents after full and adequate disclosure; and DR:5-105, which prohibits the representation of multiple clients with conflicting interests unless it is obvious that the lawyer can adequately represent the interests of each, and the clients consent after full and adequate disclosure.

The committee has previously opined that even where the legal matters are dissimilar, the simultaneous representation of adverse clients is improper unless the clients consent and waive the conflict. LE Op. 706 (1985). Moreover, the attorney must be satisfied that his independent professional judgment on behalf of each client will not be affected and that he is capable of preserving client confidences and secrets as required under DR:4-101. LE Op. 916 (1987). It is not per se improper, under these circumstances, for the attorney to continue to represent multiple clients in unrelated matters as long as each client is fully advised of the attorney's representation of all other clients and the clients consent to the continued representation. Cf., LE Op. 1408 (1991) (full disclosure and consent will not cure conflict where it is not obvious that lawyer can adequately represent clients with conflicting interests in unrelated matters). The committee has also previously opined that an attorney cannot obtain from a child the consent required to cure a conflict under DR:5-105. LE Op. 786 (1986). In LE Op. 957 (1987) an attorney was appointed as GAL for a child in a custody dispute stemming from the illegal actions of a former

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executive director in the department of social services, whom the attorney's firm also represented in a wrongful discharge claim against the agency. The committee concluded that the attorney's role as GAL for the child prevented the attorney from obtaining the child's consent because the attorney in effect would be consenting to his own representation. Thus, the attorney's firm could not continue the multiple representation.

The Code of Virginia requires that the court appoint a "discreet and competent attorney-at-law" or "some other discreet and proper person" to serve as GAL to protect the interests of a person under a disability. Va. Code § 8.01-9 (Cum. Supp. 1998). Virginia Code § 16.1-266(A) expressly limits any such appointment in the juvenile and domestic relations district court to "a discreet and competent attorney-at-law. . . ."¹ The GAL "shall represent the child . . . at any such hearing and at all stages of the proceedings unless relieved or replaced in the manner provided by law." Va. Code § 16.1-268. Va. Code § 8.01-9 states that "every guardian ad litem shall faithfully represent the estate of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected." The court may enforce this duty by removing the GAL and appointing another one. In regard to the obligations of the GAL, the Court of Appeals of Virginia has observed:

We note that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interest of the child by making a bona fide examination of the facts and if he does not faithfully represent the interest of the infant he may be removed. . . .

Norfolk Division of Social Services v. Unknown Father, 2 Va. App. 420, 425 n.5, 345 S.E.2d 533, 536 n.5 (1986). Virginia Rule of Court 8:6 for the Juvenile and Domestic Relations District Courts provides: "When appointed for a child, the guardian ad litem shall vigorously represent the child fully protecting the child's interest and welfare. . . ."

Therefore, it is the duty of the court to see that the GAL faithfully represents and protects the child's interests. To do so, the court must appoint a person, ordinarily an attorney, who is discreet and competent and who has no interest adverse to the client's interest. *Shainwald v. Shainwald*, 302 S.C. 453, 395 S.E.2d 441 (1990). The court is the gatekeeper. If a lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest under DR:5-101(A), or a multiple representation under DR:5-105, then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation.

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Thus, the committee believes that any necessary consent to a possible conflict must emanate from the court. As stated above, the child is incapable of giving consent to the representation and waiving the conflict. The court, which has the statutory responsibility for supervision of the GAL according to Va. Code § 16.1-266, is the only agency with the authority to consent to such representation. In like fashion, the GAL must fully disclose to the court any conflict of interest that may arise *after* the appointment.

A lawyer who serves as an infant's GAL, whether or not an attorney-client relationship exists, must act in conformity with the ethical standards governing the avoidance of conflicts of interests that impair independent professional judgment or dilute loyalty. *See, e.g.,* LE Op. 957, LE Op. 1463 and LE Op. 1626. *See also In re Guardianship of Tamara, L.P.,* 177 Wis. 2d 770, 503 N.W.2d 333 (1993). In the absence of full disclosure to the court of possible conflicts, the lawyer serving as GAL violates his ethical duty both to the court that appoints him and to the infant whose interests he is to represent faithfully.

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